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Cool drafting

15 November 10

Opportunities offered by the climate change burden, which the authors argue presents an opportunity for positive action on the environment

by Richard Leslie, Andrew Steven

Section 68 of the Climate Change (Scotland) Act 2009, which came into force on 1 April 2010, introduced a new s 46A into the Title Conditions (Scotland) Act 2003. This created an additional type of personal real burden, known as a climate change burden, which conveyancers can use under the conditions set out. For an earlier critical discussion, see E Sinclair, "A new burden is born" (Journal, December 2009, 58). It is one of the many innovations made by the 2009 Act with the aim of addressing the effects of global warming in a Scottish context.

Clear purpose

Like other personal real burdens, the scope of a climate change burden is strictly delimited. It can only be used for the purpose of reducing greenhouse gas emissions (2003 Act, s 46A(1)). This will allow landowners, primarily those in the public sector, to impose obligations which mean that if the property is developed then it must meet "specified mitigation and adaptation standards": s 46A(2).

Mr Sinclair asked in his article why this purpose was not given effect by the 2009 Act amending the planning legislation, rather than introducing a new personal real burden. Planning conditions, however, can be negotiated away, or may be the subject of political will, whereas a personal real burden can only be discharged or varied by the person who has the power to enforce it, or by the Lands Tribunal. Thus, this mechanism was attractive to our legislators.

Who can enforce?

The new provision is loosely modelled on another of the personal real burdens, the conservation burden. Climate change burdens can be created by any person disposing land, whether in the public, private or voluntary sectors, in favour of either the Scottish Ministers or of a public body or trust: s 46A(1).

A "public body" is defined in s 46A(3) as a body listed in part I or II of the schedule to the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003. These are the bodies entitled to enforce conservation burdens and include all local authorities. However, there is no definition of "trust". The apparent effect is that the new burden can be created in favour of any trust, private or public. This is surely a drafting error and we would expect further legislation to amend the

provision so that only trusts on the list of conservation bodies, or those subsequently added to it, can enforce. This may be done by ministers under the 2003 Act, s 128(4).

While a climate change burden can only be enforced by certain bodies, it can be imposed by anyone, provided that the burden is created in favour of such a body. So Scottish Water and Scottish Enterprise, despite not being relevant bodies, can in fact use the new provision. However, in a departure from the rule for conservation burdens (see 2003 Act, s 38(2)), there is no provision requiring the consent of the body to be obtained in advance. In other words, a landowner could legitimately create a climate change burden with fairly onerous conditions and then expect a public body to enforce it without first clearing it with them. Further subsidiary legislation will be required to bring in an obligation to obtain consent.

There are further gaps in s 46A. For example, there is no prohibition on creating a standard security over the burden (compare s 38(3)), and no provisions on enforcement where there is not a completed title (compare s 40), on completion of title (compare s 41), and on extinction where the body ceases to be a relevant body (compare s 42). These may be a result of the new provision being a late amendment to the bill which is now the 2009 Act.

Use by local authorities

In his article Mr Sinclair doubts whether local authorities will voluntarily use a climate change burden because it may lower the value of the land. This could present a potential difficulty in terms of their duty to obtain best value under the Local Government (Scotland) Act 1973, s 74.

The Scottish Government, however, has recently made the Disposal of Land by Local Authorities (Scotland) Regulations 2010 (SSI 2010/160). These came into force on 1 June 2010. In terms of reg 4 a local authority "may dispose of land for a consideration less than the best that can reasonably be obtained", provided that it is satisfied that disposal for the consideration is "reasonable" and contributes to one of a number of specified purposes. One of these is "environmental wellbeing". It seems to us therefore that climate change burdens offer a real opportunity for local authorities wishing to pursue an environmentally responsible agenda and influence local carbon reductions from previously held public assets.

Drafting challenge

As with all real burdens, precise drafting is the aim. Conveyancing practitioners will be aware that a real burden must be clearly expressed within the four corners of the deed: see *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 SC 788 (now qualified a little by the 2003 Act, s 5), where one of the reasons that a burden failed was that it referred to legislation without setting it out fully. A difficulty that may be found in drafting a climate change burden, as pointed out by Mr Sinclair, is that statute law is very relevant in this area. It may indeed be a

challenge to express adequately what is intended without reference to legislation or to a standard that is ephemeral and subject to change.

Ideally, a climate change burden should seek to conserve, or generate, heat and/or power, or alternatively to preserve or capture carbon, on a property. Thirdwave Ltd, whose research informed the introduction of the burden, is authoring publicly available guidance to set out possibilities (see www.thirdwave.org.uk). These include imposing positive obligations such as the installation of renewable energy systems or insulation materials and double glazing, or requiring design interventions into buildings to make use of natural light, non-mechanical ventilation or increased water efficiency in building operations. A negative burden might require the exclusion of high-embodied energy, petrochemically based materials, such as PVC, where other suitable options exist.

A further example aimed at preserving or capturing carbon is a burden which places an obligation upon an owner of land to increase carbon sequestration through tree planting, and to consult with the Forestry Commission as to species of trees, and density of planting. This may accord well with a conservation body or charity seeking to dispose of land but retain an environmental focus for it.

A simple drafting example of a climate change burden to be placed within the body of a disposition could read: "The Disponees shall within six months of the commencement of the development of the Burdened Property [as defined] install such renewable energy apparatus thereon so as to make it self-sufficient for electricity, which obligation is constituted as a climate change burden and is imposed upon the Burdened Property in favour of [Public Body]".

A schedular version might be: "The following climate change burden is imposed on the Burdened Property [as defined] in favour of [Public Body]: The Disponees shall within six months of the commencement of the development of the Burdened Property install such renewable energy apparatus thereon so as to make it self-sufficient for electricity."

It remains to be seen how these new burdens will be used. Future guidance and a growing awareness of the burdens will, no doubt, increase their usage, and test the boundaries of how carbon interventions can be defined and defended within advancing scientific understanding and the established four corners rule.

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